Bensa Sdn Bhd (in liquidation) v Malayan Banking Bhd & Anor

HIGH COURT (JOHORE BAHRU) — ORIGINATING MOTION NO 25-20 OF 1992
JAMES FOONG J
1 FEBRUARY 1993

Companies and Corporations *— Winding-up — Whether a fixed deposit receipt placed as collateral and duly registered is secured debt — Whether it is registrable under the Companies Act 1965 — Companies Act 1965 ss 4 & 108(3)*

Companies and Corporations *— Winding-up — Creation of a collateral — Whether undue preference was created by giving such collateral — Companies Act 1965 s 293(1) & (2) — Bankruptcy Act 1965 s 53(1)*

Companies and Corporations *— Winding-up — Whether counsel for liquidator had locus standi to act in the proceedings — Companies Act 1965 s 236(1)(c)*

Companies and Corporations *— Winding-up — Liquidator — Application by liquidator for asset to be distributed as unsecured charge — Whether actions of liquidator void without authority of court — Companies Act s 236(2) & (3)*

The company contracted to construct two blocks of flats for the Urban Development Authority ('UDA'). A performance bond to cover the company's due performance and completion of the contract was obtained by the company from the second respondent ('the insurance company'). As consideration for issuing the bond, the insurance company obtained from the company as collateral, money placed in a fixed deposit account ('the FD') with the first respondent ('the bank'). The company executed a memorandum of deposit cum letter of guarantee/authority in favour of the insurance company in relation to the FD. This was duly registered as a charge. The company was wound up and the UDA terminated the contract as the company had defaulted in performing the contract. The UDA claimed for damages from the insurance company under the performance bond. The liquidator of the company applied for an order demanding that the bank returned the FD to the company. He claimed that the FD was not a secured debt and must therefore be returned for distribution. He also claimed that there was undue preference by the company when depositing the FD as a collateral with the insurance company and such acts are void. He further claimed that the disposition of the property of the company was made after the commencement of the winding-up and was therefore void. It was contended for the insurance company that the counsul for the liquidator had no locus standi and the actions of the liquidator in bringing the motion is void under s 236(2) and (3) of the Companies Act 1965 ('the Act').

Held, dismissing the application:

(1) The memorandum of deposit cum letter of guarantee/authority is a debenture within the meaning of s 4 of the Act. It is a security granted by the company to the insurance company and as such is properly registered under s 108(3)(a) of the Act. It is therefore a secured debt and does not fall within the distribution priorities of unsecured debts.

(2) There was no undue preference as the company was solvent when the transaction took place and it was a normal straightforward commercial dealing in the usual course of business.

(3) The disposition of the FD was completed by the act of depositing the FD receipt with the insurance company. The FD being an asset of the company, was passed into the hands and in the possession of the insurance company way before the winding-up of the company.

(4) Counsel for the liquidator had no locus standi as s 236(1)(e) of the Act requires that authority be granted by the court or by the committee of inspection. There was no evidence here that such authority had been granted. However, the actions of the liquidator in bringing the motion is not void under s 236(2) and (3) because under these provisions, the court has only control and there is no need for authority from the court to commence the action.

[Bahasa Malaysia summary

Syarikat Bensa mengikat kontrak untuk membina dua blok rumah pangsa untuk UDA. Suatu bon pelaksanaan untuk menjamin pelaksanaan dan penyiapan kontrak itu oleh syarikat itu telah diperolehi oleh syarikat itu daripada penentang kedua ('syarikat insurans itu'). Sebagai balasan pengeluaran bon itu, syarikat insuran itu telah mendapat dari syarikat itu sebagai kolateral, wang yang diletak dalam akaun simpanan tetap ('FD itu') di dalam bank penentang pertama ('bank itu'). Syarikat itu telah menyempurnakan suatu memorandum deposit yang juga surat jaminan/kuasa memihak kepada syarikat insurans itu yang berkaitan dengan FD itu. Ini telah didaftarkan sebagai suatu tanggungan. Syarikat itu digulung dan UDA telah menamatkan kontrak itu kerana syarikat itu telah ingkar dalam pelaksanaan kontrak itu. UDA telah menuntut ganti rugi dari syarikat insurans itu dibawah bon pelaksanaan. Penyelesai syarikat itu telah memohon untuk suatu perintah menuntut supaya bank itu mengembalikan FD itu kepada syarikat itu. Beliau mendakwa bahawa FD itu bukan suatu hutang bercagar dan oleh itu mesti dikembalikan untuk pembahagian. Beliau juga mendakwa bahawa terdapat keutamaan tidak wajar oleh syarikat itu apabila meletakkan FD sebagai kolateral dengan syarikat insurans itu dan perbuatan demikian adalah tidak sah. Beliau juga mendakwa bahawa pelupusan harta syarikat itu dibuat selepas permulaan penggulungan dan oleh itu adalah tidak sah. Dihujahkan untuk syarikat insurans bahawa peguambela penyelesai tidak mempunyai locus standi dan perbuatan penyelesai mengemukakan usul itu adalah tidak sah dibawah s 236(2) dan (3) Akta Syarikat 1965 ('Akta itu').

Diputuskan, menolak permohonan itu:

(1) Memorandum deposit yang juga surat jaminan/kuasa adalah suatu debentur di dalam makna s 4 Akta itu. Ia merupakan suatu cagaran yang diberi oleh syarikat itu kepada syarikat insurans itu dan oleh demikian didaftarkan dengan betul di bawah s 108(3)(a) Akta itu. Oleh itu, ia adalah suatu hutang bercagar dan tidak termasuk dalam pembahagian prioriti hutang tidak bercagar.

(2) Tidak terdapat keutamaan tidak wajar kerana syarikat itu solven apabila urus niaga yang melibatkan FD itu dibuat dan ia merupakan suatu urusan perdagangan yang biasa, jelas dan mudah.

(3) Pelupusan FD diselesaikan oleh perbuatan meletakkan resit FD dengan syarikat insurans itu. FD itu, sebagai suatu aset syarikat itu, telah diberikan kepada dan berada di dalam milikan syarikat insurans lama sebelum penggulungan syarikat itu.

(4) Peguambela untuk penyelesai tidak mempunyai locus standi kerana s 236(1)(c) Akta itu mensyaratkan supaya kuasa diberikan oleh mahkamah atau oleh jawatankuasa pemeriksaan. Tidak terdapat keterangan di sini yang menunjukkan bahawa kuasa sedemikian telah diberi. Akan tetapi, perbuatan penyelesai mengemukakan usul itu bukanlah tidak sah dibawah s 236(2) dan (3) kerana dibawah peruntukan ini, mahkamah hanya mempunyai kawalan dan tidak perlu mendapatkan kuasa daripada mahkamah untuk memulakan tindakan.]

Cases referred to

1 *British India etc Co v IRC* (1881) 7 QBD 165 (refd)
2 *Levy v Abercorris Co* (1887) 37 Ch D 260 (refd)
3 *Edmonds v Blaina Co* (1887) 36 Ch D 215 (refd)
4 *Illingworth v Houldsworth* [1904] AC 345 (refd)
5 *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 (refd)
6 *Bah Heng Hong Sdn Bhd v The Provisional Liquidator Choong Shin Cheong & Anor* [1992] 3 CLJ 1421 (folld)

Legislation referred to

Bankruptcy Act 1965 s 53(1)
Companies Act 1965 ss 4, 108(3), 236(1), (2) and (3), 293(1), (2)

Ong Ban Chai and *Phang Weei Min* (*Ong Ban Chai & Co*) for the applicant.

SY Lai (*SY Lai & Assocs*) for the second respondent and mentioning on behalf of the first respondent.

Cur Adv Vult

James Foong J: This is an application by the applicant, the liquidator of a private limited company known as Bensa Sdn Bhd ('the company'), for an order that the first respondent, the Malayan Banking Bhd ('the bank') do refund to the company a sum of RM115,000 being money placed in a fixed deposit account with the bank by the company together with the appropriate interest. For the placement of the fixed deposit, a receipt was issued by

the bank in favour of the company. (This fixed deposit receipt I shall hereinafter refer to as the FD).

At the hearing of this application, the bank did not reply to the application but instead left the matter entirely to the second respondent, the Malayan British Assurance Bhd ('the insurance company').

The background of this case is as follows. The company was awarded a contract to construct superstructural works for two blocks of flats for the Urban Development Authority ('UDA'). As commonly required, a performance bond to cover the company's due performance and completion of the said contract was obtained by the company from the insurance company in favour of UDA up to a sum of RM757,515.41.

As consideration for issuing the performance bond, the insurance company obtained, inter alia, from the company as collateral, the deposit of the FD. Corresponding with the deposit of this FD, the company executed in favour of the insurance company, a memorandum of deposit cum letter of guarantee/authority dated 13 May 1987 in favour of the insurance company, all relating to the FD. With these, the insurance company proceeded to register the aforesaid as a charge with the registrar of companies presumably in accordance with s 108(1) of the Companies Act 1965 ('the Act'). A certificate of registration of this charge was issued by the registrar pursuant to s 111(2) of the Companies Act 1965 on 24 December 1987.

On 3 April 1988, a petition was presented in the High Court at Johore Bahru to wind up the company and on 27 April 1989, the company was would up by the said court.

On 13 August 1989, the liquidator in this case was appointed for the company and he proceeded to demand from the bank for the return to the company the sum of RM115,000 placed under the FD.

In the meantime, the company, having defaulted in completing the said contract with UDA, had their agreement terminated for breach by UDA, who in turn claimed from the insurance company under the performance bond. The insurance company paid out a sum of RM357,515.41 to UDA. In turn, the insurance company took steps to realize the FD deposited with them by the company as a collateral. this was resisted by the bank on various grounds and is at present subject to a separate civil suit filed in the High Court at Kuala Lumpur.

For the time being, the bank and the insurance company seem to be of a common mind and have joined hands in warding off this claim by the liquidator before proceeding to settle their own disputes after this case.

The liquidator's claim is mainly on the following grounds:

(i) that the sum of MR115,000 under the FD deposited with the insurance company is not a secured debt under s 292(1) of the Act and therefore, must be returned to the liquidator for distribution in accordance with s 292 of the Act;

(ii) that there was undue preference by the company in depositing the FD as a collateral with the insurance company and therefore, such acts were void under s 293 of the Act; and

(iii) that the disposition of the property of the company (ie the FD) was made after the commencement of the winding-up by the court and is therefore void unless otherwise ordered by the court as provided for under s 223 of the Act.

The insurance company in reply, argued that the FD was a fixed charge duly registered and therefore falling within the category of a secured debt. As a secured debt, it has priority over unsecured debts as provided by s 292(1) of the Act.

Further, there was no undue preference as alleged by the liquidator since at the creation of the collateral, the company was solvent and in a sound financial position; there was no intention by the parties to create any preferential treatment to the insurance company except that of a usual commercial transaction.

As to the last allegation, counsel for the insurance company replied that the disposition of the FD receipt was done before the commencement of the winding-up of the company.

In the course of the argument of this case, a very important point that has great effect and significance to the first issue arose out of an assertion by the liquidator's counsel that the transaction, whereby the FD was placed as a collateral with the insurance company, cannot be registered as a charge under any of the provisions of s 108(3) of the Act. Such being the case, the charge so registered is void and has no effect as a secured debt.

In order to determine this point, I set out below the type of charges provided for under s 108(3) of the Act that can be registered:

(a) a charge to secure any issue of debentures;
(b) a charge on uncalled share capital of a company;
(c) a charge on shares of a subsidiary of the company which are owned by the company;
(d) a charge or an assignment created or evidenced by an instrument, which if executed by an individual within West Malaysia and affecting property within West Malaysia, would be invalid or of limited effect if not filed or registered under the Bills of Sale Ordinance 1950;
(e) a charge on land wherever situated or any interest therein;
(f) a charge on book debts of the company;
(g) a floating charge on the undertaking or property of a company;
(h) a charge on calls made but not paid;
(i) a charge on a ship or aircraft or any share in a ship or aircraft; and
(j) a charge on goodwill, on a patent or licence under a patent, on a trademark, or on a copyright or a licence under a copyright.

Of the aforesaid, only two types are of significance to this case. The first being under s 108(3)(a), 'a charge to secure any issue of debentures' and the second, under s 108(3)(g) 'a floating charge on the undertaking or property of a company'.

It is argued that if it is a floating charge, it may fall within s 292(4) of the Act. Where it is not only an unsecured debt but also ranked lower in priorities to other unsecured debtors, such as those in s 292(1)(b), (d) and (e) of the Act relating to wages, salaries, remuneration and employment benefits of the employees of the company.

In order to determine this point, one must conduct a careful perusal of the transaction and instrument that created this collateral which subsequently led to its registration as a charge by the registrar of companies. This document is the memorandum of deposit cum letter of guarantee/authority.

In this document which is exhibited as LKC-6 in the affidavit of the insurance company (encl 7) (of which I shall hereinafter refer to a LKC6),

I find that it bears the following heading: 'Memorandum of Deposit. Letter of Guarantee/Authority.' A

In the operative part, it begins with:

> In consideration of your issuance of an insurance guarantee against advance payment (for works) for the sum of RM757,515.41 to UDA for (the said contract), we Bensa Sdn Bhd of No 85A, SS21/37, Damansara Utama, Petaling Jaya, hereby deposit with you fixed deposit receipt no 005410 made out in our favour from Malayan Banking Bhd, Damansara Utama, Petaling Jaya for a total sum of RM115,000 as security for the payment to you on demand of all moneys now or hereafter owing by us together with interest thereon up to date of payment in respect of the guarantee. B

This type of instrument, has of late, been increasingly used due to insistance by developers and owners demanding performance bonds to be supplied by contractors to guarantee up to a certain amount of money on the due performance and obligations of the contractors on the works undertaken by them. This in turn has affected the insurance industry who are by far the largest supplier of such performance bond. And in turn, they request various securities from the contractors, one of which is the type aforestated. C D

The next question to be asked is whether LKC6 is a 'debenture' falling within the category as provided for under s 108(3)(a) of the Act.

As early as the 19th century, the English judges have found difficulty in defining this term 'debenture'. As observed by Lindley J in *British India etc Co v IRC*,[1] '... what the correct meaning of "debenture" is I do not know. I do not find anywhere any precise definition of it. We know that there are various kinds of instruments commonly called debentures.' E

Again, in *Levy v Abercorris Co*,[2] Chitty J expressed a similar view: 'I cannot find any precise legal definition of the term, it is not either in law or commerce a strictly technical term, or what is called a term of art.'

However, the same judge, Chitty J in the case of *Edmonds v Blaina Co*[3] did describe 'debenture' as follows: F

> The term itself imports a debt — an acknowledgment of a debt — and speaking of the numerous and various forms of instruments which have been called debentures without anyone being able to say the term is incorrectly used. I find that generally, if not always, the instrument imports an obligation or covenant to pay. This obligation or covenant is in most cases at the present day accompanied by some charge or security. G

To my mind, this 19th century definition of Chitty J above, where at first he cannot give any precise legal definition, ought to be given a more liberal outlook to meet the modern day needs where the sphere of business has increased substantially due to modern technology and communication. In the present day, a wide range of forms and instruments are introduced to meet the ever changing needs of modern day commerce and for this, the term 'debenture' should also include besides 'debt', any obligation, covenant, undertaking or guarantee to pay or any acknowledgment thereof. H I

In fact, s 4 of our Act defines 'debentures' to include 'debenture, stock, bonds, notes and any other securities of the corporation whether constituting a charge on the assets of the corporation or not'. An obligation, covenant, undertaking or a guarantee to pay such as that in LKC6 would

A certainly fall within the last category of this definition 'any other securities'. In this respect, I find that LKC6 is a debenture. It contains the elements of an obligation, covenant, undertaking or guarantee to pay. It is a security granted by the company to the insurance company and as such is properly registered as a charge under para (a) of s 108(3) of the Act. As the charge is duly registered, it is a secured debt and does not fall within the distribution B priorities of unsecured debts as stated in s 292 of the Act.

I cannot agree with the contention that LKC6 creates a floating charge, thus falling within s 108(3)(g) of the Act. A floating charge as defined in *Illingworth v Houldsworth*[3] is 'ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to C effect'. In this case, the security created is over a fixed property, that of the FD. It does not float with the properties of the company since the property itself in this case is in the hands of the insurance company.

I shall now proceed to deal with the second contention of the liquidator. This relates to the undue preference created by the company in depositing the FD with the insurance company and is thus void under s 293 of the Act. D If it is void, such property must be returned to the liquidator.

Section 293(1) of the Act must be read together with s 53(1) of the Bankruptcy Act 1965 which is in line with the Supreme Court judgment in *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors.*[5]

E In order to qualify under s 53(1) of the Bankruptcy Act 1965 and made applicable to s 293(1) and (2) of the Act, I shall accept the five conditions to be fulfilled as laid down in an earlier case decided by me — *Bah Heng Hong Sdn Bhd v The Provisional Liquidator Choong Shin Cheong & Anor.*[6] These are:

F (1) that the transaction in question took place within six months prior to the commencement of the winding-up;
(2) that it satisfied the description of one of the types of transaction mentioned in s 53(1) of the Bankruptcy Act 1965;
(3) that it took place at a time when the company was insolvent;
(4) that the person in whose favour the transaction was effected stood in G the relation of creditor to the company; and
(5) the effect of the transaction was to confer on that person a preference priority or advantage over other creditors in the winding-up.

Of all the five conditions, I find that only (2) and (4) are fulfilled while the rest are not satisfied. From the evidence adduced on affidavits, I find that H LKC7 was created on 13 May 1987, while even earlier, on 17 April 1986, the company has passed a resolution approving the creation of the FD collateral in favour of the insurance company. All these are well before the date of the presentation of the winding-up petition against the company which was on 3 April 1988.

I When the aforesaid transaction took place, the company was very solvent as contended by the insurance company's counsel. It was about to or had received as an advance payment a sum of RM757,517.41 from UDA in pursuance to its contract works. Such being the case, there are no evidence that the company was insolvent at the material time.

The transaction that took place between the company and the insurance company is to my mind a normal straightforward commercial dealing as is practised in the usual course of such business. The creation of the FD collateral cannot be said to have in the absence of any evidence to the contrary, an intention of the parties at the material time to confer a preferential priority or advantage over other creditors. In any event, as stated earlier, the transaction took place six months before the winding-up petition was presented thus annulling the presumption of such an intention.

Based on the aforesaid, I therefore reject the liquidator's second contention.

As for the third contention of the liquidator, I cannot agree that the disposition of the FD was made after commencement of the winding-up by the court. The disposition of the FD was already completed by the act of depositing the FD receipt together with LKC7 with the insurance company. The FD being an asset of the company, was passed onto the hands and in the possession of the insurance company way before the winding-up of the company. Such being the case, I do not think that the transaction is void under s 223 of the Act.

One further point that arose during the course of trial is the allegation that Mr Ong Ban Chai, counsel for the liquidator, had no locus standi in these proceedings under s 236(1)(e) of the Act. Further, the actions of the liquidator in bringing this motion to court is void under s 236(2) and (3) of the Act.

Section 236(1)(e) of the Act states as follows: 'The liquidator may with the authority either of the Court or of the committee of inspection appoint an advocate to assist him in his duties.'

There is no evidence of such authority granted by the court or by the committee of inspection. Mr Ong Ban Chai of course argued that though the court's permission was not obtained, the committee of inspection could grant such authority. This, to him, should be an internal affair of the company. I cannot accept this contention in the absence of any evidence to show that the committee of inspection has granted such authority. Section 236(1)(e) of the Act clearly lays down such a requirement and when challenged, proof must be tendered that such authority does exist and not just by a mere wave of the hand to dismiss it as an internal arrangement.

As for s 236(2) of the Act which involves various activities of the liquidator in carrying out his duties to wind up the affairs of the company and distribute its assets, the court shall as provided by s 236(3) of the Act have only a control over such matters. 'Control' unlike 'authority' as stated in s 236(1) of the Act is that it can commence but subject to the approval of the court. As for 'authority', one cannot even begin to commence unless authority or permission is granted. As for this contention, I find that the acts of the liquidator in bringing this motion to court is not void under s 236(2) and (3) of the Act but, the appointment of Ong Ban Chai as an advocate to assist the liquidator is.

Based on the reasons stated aforesaid, I dismissed the liquidator's motion with costs.

Application dismissed.

Reported by Philip Koh